DESIGN-BUILD CONTRACTING TOOLS

HOWARD W. CARSMAN

Bullivant Houser Bailey PC

Attorneys at Law
DESIGN-BUILD

1. A DEPARTURE FROM TRADITIONAL CONSTRUCTION CONTRACTING

2. DIFFERENT RISK ALLOCATION
DESIGN-BUILD

GREATER LEVEL OF TEAMWORK

DESIGN-BUILD CONTRACT

» DOES IT CONTAIN THE PROPER TOOLS?

» DOES IT ADDRESS NEEDED TEAMWORK?
IN THE BEGINNING

- BUY PROPERTY
- DEVELOP SITE
- DESIGN PROJECT
ALL AT THE SAME TIME?!?!?

THE PROBLEM

➡ OWNER WANTS ESTIMATE AND SCHEDULE TO DETERMINE PROJECT FEASIBILITY

BUT
THE PROBLEM

 ASSERT DESIGN NOT COMPLETE
ENOUGH TO ESTABLISH
PRICE OR SCHEDULE

AND

THE PROBLEM

 ASSERT OWNER CAN’T
COMMIT UNTIL
PRICE AND
SCHEDULE ARE
DETERMINED
THE SOLUTION

PRELIMINARY DESIGN-BUILD AGREEMENT

(AGC NO. 400)

AGC NO. 400

ESTABLISHES CONTRACTUAL RELATIONSHIP BETWEEN OWNER AND DESIGN-BUILDER TO DEVELOP ---

PROJECT DESIGN

PRELIMINARY SCHEDULE

PROJECT ESTIMATE
OWNER CAN HAVE DESIGN-BUILDER ASSIST IN DEVELOPING OWNER’S PROGRAM (3.2.1)

DESIGN-BUILDER PREPARES PRELIMINARY SCHEDULE (3.2.3)

DESIGN-BUILDER PREPARES PRELIMINARY ESTIMATE (3.2.4)

CONTRACT HAS DEFINED DURATION (6.1)

DESIGN-BUILDER IS COMPENSATED FOR ITS SERVICES (7.1)

IF OWNER PROCEEDS WITH PROJECT, PARTIES WILL ENTER INTO ANOTHER CONTRACT (5.2)
AGC NO. 400

ADDRESS OWNERSHIP OF DOCUMENTS (4.1)

NO, MINE!

UPON MAKING PAYMENT AS REQUIRED BY CONTRACT, OWNER RECEIVES OWNERSHIP OF THE PROPERTY RIGHTS
AGC NO. 400 DOCUMENT OWNERSHIP

DESIGN PROFESSIONAL RETAINS COPYRIGHT

OWNER CAN’T USE, REPRODUCE OR MAKE DERIVATIVE WORKS FROM THE DOCUMENTS FOR OTHER PROJECTS WITHOUT WRITTEN AUTHORIZATION OF DESIGN PROFESSIONAL
AGC NO. 400
DOCUMENT OWNERSHIP

➔ IF OWNER USES DOCUMENTS ON OTHER PROJECTS OR WITHOUT WRITTEN CONSENT, OWNER ASSUMES THE RISK AND INDEMNIFIES DESIGN PROFESSIONAL/DESIGN-BUILDER

THE PROBLEM

HANDLING CHANGE ORDERS

➔ FAIRLY
➔ PROMPTLY
➔ WITHOUT INTERRUPTING WORK
THE SOLUTION

- OWNER / DESIGN-BUILDER
  STANDARD FORM AGREEMENT

(ARTICLE 9, AGC NO. 410)

ARTICLE 9
AGC NO. 410

- COMBINES TRADITIONAL
  CHANGE ORDER PROVISION
  WITH THOSE MORE SUITED TO
  DESIGN-BUILD DEMANDS

- BASIS OF PAYMENT IS COST OF
  WORK WITH A GUARANTEED
  MAXIMUM PRICE (GMP)
ARTICLE 9
AGC NO. 410

OWNER AND DESIGN-BUILDER ---

“SHALL NEGOTIATE IN GOOD FAITH
AN APPROPRIATE ADJUSTMENT
TO THE GMP OR THE ESTIMATED
COST OF THE WORK . . . .” (9.1.3)

ARTICLE 9
AGC NO. 410

OWNER MAY DIRECT CHANGES,
IN WRITING, PRIOR TO REACHING
ANY AGREEMENT WITH DESIGN-
BUILDER ON COST OR TIME ---

BUT
ARTICLE 9
AGC NO. 410

OWNER AND DESIGN-BUILDER ---

“SHALL NEGOTIATE EXPEDITIOUSLY AND IN GOOD FAITH FOR APPROPRIATE ADJUSTMENTS . . . . “

(9.2.2.)

ARTICLE 9
AGC NO. 410

IF OWNER AND DESIGN-BUILDER DISAGREE AS TO WHETHER WORK REQUIRED BY OWNER IS WITHIN SCOPE OF

THE WORK ---
ARTICLE 9
AGC NO. 410

- DESIGN-BUILDER FURNISHES OWNER WITH COST ESTIMATE TO PERFORM WORK
- IF OWNER ISSUES WRITTEN ORDER TO PROCEED, DESIGN-BUILDER PROCEEDS WITH WORK

ARTICLE 9
AGC NO. 410

- OWNER PAYS DESIGN-BUILDER 50% OF ITS ESTIMATED COST TO PERFORM WORK
- BOTH PARTIES RESERVE THEIR RIGHTS, BOTH AS TO SUMS PAID AND AS TO CLAIMS FOR ADDITIONAL PAYMENT
THE PROBLEM

RESOLVING DISPUTES DURING THE PROJECT

SOLUTION

1 CREATE FOUNDATION FOR COMMUNICATION AND PROBLEM SOLVING
"OWNER AND DESIGN-BUILDER AGREE THAT THEY WILL ENGAGE IN PARTNERING THAT WILL INCLUDE . . ."
PARTNERING - THE CONTRACT

“... DESIGN-BUILDER, DESIGN PROFESSIONALS, SUBCONSULTANTS, AND SUBCONTRACTORS.”

PARTNERING - THE CONTRACT

“THE PARTNERING PROCESS WILL ...”
“... BUILD TEAMS ACROSS ORGANIZATIONAL LINES TO PROMOTE THE SUCCESSFUL COMPLETION OF THE PROJECT AND ...”

“... PROVIDE A PROCESS TO RESOLVE DISPUTES AND CONFLICTS.”
“OWNER AND DESIGN-BUILDER
RECOGNIZE THAT PARTNERING
ENCOURAGES OPEN
COMMUNICATION AMONG
PROJECT PARTICIPANTS AND
PROBLEM SOLVING, . . .”

“. . . WHICH WILL OCCUR IN A
MANNER THAT DOES NOT VIOLATE
OR INTERFERE WITH THE
CONTRACTUAL RELATIONSHIPS
OR WITH THE DESIGN-BUILDER’S
CONTROL OVER THE WORK.”
SOLUTION

② GIVE EXECUTIVES AND PROJECT PERSONNEL TOOLS TO RESOLVE DISPUTES QUICKLY AND FAIRLY
ADR TOOLS

✓ AGC DOCUMENTS

- PROVIDE FOR DIRECT NEGOTIATIONS FOLLOWED BY MEDIATION

- PROVIDE ADR MENU -- DRB, MINI-TRIAL, BINDING ARBITRATION

ADR TOOLS

✓ PROVIDE SELECTION OF ADR PROCESSES ---

- FORMAL ELEVATION PROCESS
- INDEPENDENT PROJECT NEUTRALS
- MEDIATION